DOCUMENT RESUME

ED 070 316 EM 010 618

AUTHOR Aleinikoff, Eugene N.

TITLE Copyright Considerations in Educational Broadcasting.

INSTITUTION Stanford Univ., Calif. ERIC Clearinghouse on Educational Media and Technology.
SPONS AGENCY National Inst. of Education, Washington, D. C.
PUB DATE Dec 72
CONTRACT OEC-1-7-070-873-4581
NOTE 14p.

EDRS PRICE MF-$0.65 HC-$3.29
DESCRIPTORS *Copyrights; *Educational Radio; *Educational Television; Federal Court Litigation; *Guides; *Instructional Television; Public Television

ABSTRACT

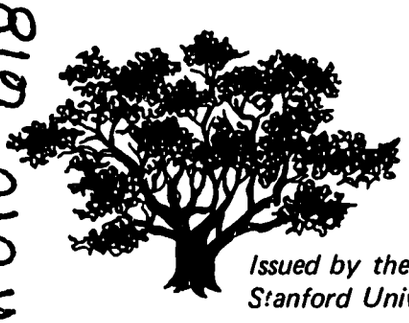
The discussion of copyright law presented here begins with a summary of a few basic aspects of American copyright law. It then goes on to discuss the particular application of this law to educational broadcasting by explaining first copyright law itself and then the historical doctrine of "fair use". "Fair use" is not mentioned in the copyright law but has been progressively developed by the American court to avoid unduly harsh copyright enforcement. The specific application of these principles of law to the use of books and periodicals, music and records, motion pictures, television programs, filmstrips, and photographs is discussed in regard to their use in educational broadcasts. Some of the most recent developments in copyright litigation are briefly summarized in conclusion. A selected bibliography is appended. (JY)

An ERIC Paper

COPYRIGHT CONSIDERATIONS IN EDUCATIONAL BROADCASTING

By Eugene N. Aleinikoff

December 1972

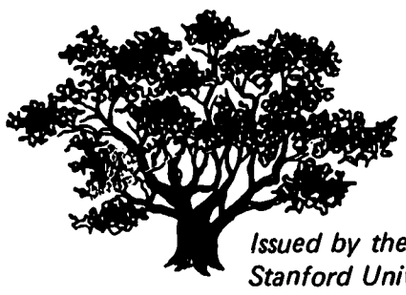


Issued by the ERIC Clearinghouse on Media and Technology
Stanford University, Stanford, California 94305

COPYRIGHT CONSIDERATIONS IN EDUCATIONAL BROADCASTING

By Eugene N. Aleinikoff

December 1972



Issued by the ERIC Clearinghouse on Media and Technology
Stanford University, Stanford, California 94305

The author, Eugene N. Aleinikoff, serves as broadcast counsel to the Corporation for Public Broadcasting. He is a member of the law firm of Dannenberg, Hazen and Lake in New York City and teaches a course in copyright law at Rutgers Law School in Newark, New Jersey.

TABLE OF CONTENTS

INTRODUCTION

As educational media become more complex and educational methods more sophisticated, easy and broad use of informational and instructional materials becomes increasingly indispensable to educators. The familiar textbook, already extended by the older mimeograph machine and the newer xerography equipment, has also been supplemented by communications aids ranging from the slide-sets, filmstrips, audio cassettes, 16mm films and instructional videotapes now current, to the computer, cable and broadcasting technologies in development. As a result, traditional concepts about what constitutes teaching materials and how they may be used now require review and revision.

The fundamental issue is clear: Educational broadcasters are primarily interested in *availability for use;* authors and publishers are primarily interested in *payment for use.* That is not to say there is no cross-relationship between the two. Many educators are authors and expect supplemental compensation from their publications. All educational publishers realize that commercial sales are dependent upon instructional utility. But the fact remains that the teacher seeks to bring information to students in what is to him the most immediate and compelling fashion, while the publisher must of necessity be concerned about protection of his economic market against what he considers unfair use or destructive competition—and the two points of view are often not compatible in practice.

In the United States, the legal balance between the information consumer and entrepreneurial proprietor is principally established by the copyright law. Unfortunately, the American copyright statute of today differs very little from when it was last enacted in 1909. Successive attempts at revision and updating since then have consistently failed. Consequently, existing American law, whether legislative or in the courts, is limited substantially to consideration of the print media. And while the 1909 Copyright Act was written in fairly general terms, application to the newer media is at best inescapably indeterminate and at worst bitterly controversial.

To add to the difficulty, the Copyright Act is itself rather oddly constructed, especially from a layman's standpoint. For example, the statute concentrates more on defining so-called "exclusive rights" of copyright holders than on setting out what constitutes prohibited conduct by copyright infringers.

Nowhere in the Copyright Act, oddly enough, appears any direct allusion to "education" or "instruction." As a consequence, hard and fast rules for educators and institutions are extremely difficult for even experienced lawyers to provide in the face of the rather indefinite perimeters of copyright protection.

COPYRIGHT PRINCIPLES

It might be well to attempt first to summarize a few basic aspects of American copyright:

Copyright Coverage

Copyright can be obtained for almost all intellectual works of a literary, artistic or creative nature, including books and poetry, magazines and newspapers, plays and choreography, lectures and sermons, music and operas, photographs and paintings, architectural plans and sculptural works—and not the least important, motion picture films and videotape programs.

By a historical quirk, audiotapes and cassettes are probably excluded, although a recent legislative amendment permits a specialized type of copyright registration and protection for phonograph records. There is also doubt about computer programs—and, of course, such recent innovations as video cassettes and video records are still to be considered by the Copyright Office.

Copyright Formalities

Valid copyright is obtained by placing the prescribed notice on the published work, and subsequently filing in the Copyright Office an appropriate application for registration accompanied by a small filing fee and (with some exceptions) two complete copies of the work. The copyright notice is usually in the form "©" followed by the year of publication and then the name of the copyright proprietor; and appears on the back of the title page in books, below the masthead on periodicals, at the bottom of the cover of sheet music, and usually at the end of educational films (although often in the opening credits of feature movies). Omission or absence of proper notice endangers copyright protection, whether in the original or subsequent versions.

Copyright Term

The copyright period is 28 years from date of publication, renewable for a second 28 years—or 56 years in all. Beyond that double term, all copyright works fall into the public domain, with one important exception: Renewal copyrights due to expire since 1962 (i.e. with an original notice of 1906 or later) have so far been extended by Congress on a year-to-year basis pending the long-expected enactment of a new copyright law, and so are not yet in the public domain. Most foreign copyrights now extend for the life of the author plus 50 years after his death—so that American and foreign protection is usually not co-extensive for the same literary or musical works.

Copyright Rights

The statutory rights of the copyright proprietor include copying, duplicating, adaptation, translation, compilation, abridgment, distribution and publication during the copyright term. In the case of operas, ballets, plays and other theatrical works, all performance and rendition rights also belong to the author and publisher. But in the case of non-dramatic literary works and non-dramatic musical works, the copyright proprietor is legally empowered only to control the right of public performance for profit.

As might be expected, the U.S. statute is still silent about the exhibit or broadcast of photographs, motion pictures and videotape programs. However, most legal experts would undoubtedly take the position that public use would require the owner's permission whether or not for a commercial purpose.

The familiar doctrine of "fair use" is non-statutory in character, but applies (to a greater or lesser extent) to all statutory rights granted by the Copyright Act.

Copyright Enforcement

Damages for infringement can include, at the judge's discretion, not only the owner's loss of profits but also the infringer's unfair gain. In addition there are set statutory penalties for various types of infringement (for example, $100 per broadcast, with each unauthorized copy or duplicate and/or each unauthorized broadcast or exhibition constituting a separate infringement).

The copyright owner is always free to obtain a court order calling for the destruction of unauthorized copies or duplicates, plus appropriate recompense for legal fees incurred in the prosecution. While criminal penalties are also provided for, they are rarely invoked except in the case of outright commercial piracy or flagrantly-illegal bootlegging.

EDUCATIONAL BROADCAST USE

Despite the broad exclusive rights of copyright owners, educational broadcasters have been able to rely upon two established copyright doctrines to justify use of material without permission or payment.

The first is provided in the copyright law itself, which limits the publisher's prerogatives to presentation "in public for profit" in the case of non-dramatic literary works (books, periodicals, lectures, etc.) and of all music other than dramatic-musical works (e.g. excluding operas, ballets, musical comedies, etc.).

The second is the well-known historical doctrine of "fair use," not mentioned in the copyright law but progressively developed by the American courts to avoid unduly harsh copyright enforcement. While both doctrines are completely distinct, they are often confused and may overlap in application. Both undoubtedly stem from the Constitutional mandate that the copyright and patent laws be aimed at the promotion of "the Progress of Science and Useful Arts" through *limited* protection of authors' and inventors' exclusive rights—thus emphasizing the latter not solely as just reward for individual creativity but more for effect on social utilization.

Performance In Public For Profit

It should be noted at the outset that this exception (i.e. not "for profit") covers only *non-dramatic* literary and musical works, and does not apply to plays, dramatic-musical works, motion pictures or television programs (with some doubt about photographs and drawings). In addition, it covers only *performances* of such non-dramatic works, and does not apply to publication, duplication, re-arrangement, translation or other adaptation (with some doubt about pre-recording or re-recording). To the confusion and consternation of the layman, each of the component phrases has become a legal term of art.

- **"Performance"**: The visual and/or aural presentation of a copyrighted work—i.e. the reading of a book, deliverance of a lecture, playing of music, exhibition of motion pictures, broadcast of television programs, projection of slides, or even hanging of a painting.

The major difficulty in interpreting "performance" lies not in the context of immediate audiences (such as theaters, concert-halls, auditoriums or art galleries), but in the techniques of transmission to removed audiences (i.e. where the multi-faceted nature of electronic systems and program formats often creates distance and time between the performer and the viewer/listener). With foresight and acumen, ASCAP, the original music performing rights licensing agency, early obtained express decisions from the American courts holding not only that radio (and later television) broadcasting constitutes "performance," but also that any reception and re-transmission—whether by way of public group-viewing (as in a tavern or bar) or by way of private individual-viewing through wired interconnection from a prime antenna (as in hotels and apartment houses)—would be legally deemed to be second "performance" to be cleared and paid for in addition to the original broadcast.

This "multiple-performance" doctrine, repeatedly confirmed by both federal and state courts, provided what looked like an unassailable basis for the motion picture distributors' suits against the CATV companies in the 1960s to prevent cable re-transmission of radio and television station signals without specific authorization from the film distributors as well as the station operators. Unexpectedly, however, the U.S. Supreme Court did not choose to follow the earlier analogies, but in *Fortnighty v. United Artists* (1968) held that the act of cable re-transmission was more in the nature of a reception device than of a broadcasting function, and hence not a "performance" deniable by the film distributors under copyright law. This view has been re-enforced for distant as well as local television signals in a recent lower court decision in New York, *CBS v. TelePrompTer* (1972).

Simultaneous cable re-transmission of radio and television programs, whether on commercial CATV or educational closed-circuit systems, is thus not presently subject to copyright liability. Not so clear, however, is off-air recording for delayed cable broadcast. In at least one case, *Walt Disney v. Alaska TV Network* (1969), commercial cable system operators were prevented from tape recording off-air in one locale for subsequent cable transmission in another. And while there has been no judicial decision sought or obtained by film distributors or television networks about off-air tape recording for subsequent cable transmission in the *same* area, it seems likely that copyright liability could be imposed either on the grounds that off-air recording constitutes illegal copying and duplication, or that delayed recorded transmission constitutes a second performance along the lines of the earlier hotel cases.

• "In Public": Performing "in public" or "publicly" has been rather liberally interpreted–from the original inclusion of hotel dining-rooms in 1917, through concert halls and movie theaters soon after, and most recently to so-called "bottle" clubs and supermarkets. Truly private clubs have been excluded, and so presumably are classrooms and lecture halls in the course of school activities. In radio and television, the original broadcast is clearly public, and its commercial reception in a public place may also be, even if no admission charge is imposed. But, again, classroom reception, whether direct or through closed circuit relay, should not be deemed "in public" any more than is home reception for immediate family members and guests.

• **"For Profit"**: It has been generally assumed that any performance for which an admission fee is charged is "for profit." Indeed this has been applied not only to commercial entertainment, but also at times to charitable benefits and educational presentations. There is little doubt that the standard school play and university concert would be considered "for profit" if tickets were sold for the performance, irrespective of the use of the proceeds for non-profit and non-commercial purposes. Similarly, the usual between-halves band performances at college football games might be deemed as much "for profit" as in professional football contests, and campus 16mm film clubs would probably be judged the same as neighborhood movie houses.

Even where no admission fee is charged, other commercial considerations may be termed "for profit." The playing of tape-recorded or piped-in music in commercial establishments like bars and dance halls has been held to be subject to ASCAP and other performing rights licensing. Possibly retail stores–whether a large department store, a neighborhood supermarket or a local barbershop–would fall into the same category so long as the music or other material is for customers' edification or enticement. Again, the courts have so far not chosen to distinguish radio or television reception and amplification from live or recorded performances on the premises. And, of course, commercial broadcasting, whether sponsored or sustaining, has a sufficiently predominant commercial tinge as to pass the "for profit" test with flying colors.

Educational television, on the air or via cable, presents somewhat of a different picture. Here, all commercial considerations–either by way of admission fee, advertising revenue, etc.–have been specifically prohibited by the Federal Communications Act for both reserved air-channels and required cable-channels. The copyright industry has therefore had to base its case for royalties on the fact that station employees and program talent are paid-for services, plus the argument that the so-called "underwriting" of ETV programs by foundation or business benefactors is not substantively different from commercial sponsorship.

There is, it is true, some judicial precedent for this broad "for profit" interpretation. In a New York case prior to the development of ETV, *Associated Music Publishers* v. *Debs Memorial Fund* (1944), a federal court held that classical music played in sustaining programs over a local radio station owned and operated by a non-profit foundation was subject to ASCAP licensing by virtue of the advertising messages carried on sponsored programs as a principal means of financing station operations. But the *Debs* situation was far different from the reserved educational television channels and radio wavelengths, since a generally allocated frequency and commercially operated station was involved. Nor would school, campus or inter-campus closed-circuit systems operated and owned by one or more educational institutions appear to be "for profit." And by analogy, the FCC-mandated educational channels on CATV systems would also seem not-for-profit despite the basic subscription charges to all viewing families, so long as programming and scheduling remain exclusively within the domain of the responsible educational authorities in the community.

Taken as a whole, there is little doubt that the "public performance for profit" language in the Copyright Act permits the rendition of music in an instructional open or closed tranmission program without payment to ASCAP or BMI, and the reading of a book or poem over educational radio or television without permission from the author or publisher. Less certain is the legal authorization to make program pre-recordings or re-recordings for local or wider usage.

There is some legal justification for assuming an educational right to pre-record for original transmission and even a plausible argument with respect to multiple re-recordings for repeated multi-school use:

Under the exact statutory wording, literary

copyright holders control transcription or recording rights only for playing or performing in public for profit (as opposed, presumably, to manufacturing, distributing and selling the transcription or recording on a consumer marketing basis). As to music, there is little direct statutory prohibition against recording or transcription other than to grant the author the exclusive right to "print, reprint, publish, copy and vend the copyrighted work" and the so-called "compulsory licensing" provision designed to apply to phonograph records and tapes.

Fair Use

"Fair Use" is an exclusionary concept, developed as an amelioratory device by the American courts outside of the Copyright Act. Broadly stated, the fair use doctrine permits quotation from copyrighted works for critical, explanatory or illustrative purposes–so long, the courts are careful to say, as the quotation is insubstantial, serves a useful purpose, does not unduly compete with the sale or exploitation of the original work, and does not otherwise utilize the original work for commercial or other advantage. Examples of "fair use" include the quotation of the words of a song in a *New Yorker Magazine* article, a Sid Caesar burlesque of "From Here to Eternity," *Mad Magazine* parodies of Irving Berlin songs, and most recently, limited quotations from an earlier *Look Magazine* article in a published biography of Howard Hughes.

The courts have so far been rather loath, however, to extend the "fair use" doctrine very far in the educational direction. Indeed, quite the opposite: In *Wihtol v. Crow* (1962), an Iowa federal court held a high school teacher and his church strictly accountable for his rearrangement of a religious hymn, "My God and I" even though copied and used only for the local school and church choirs.

Ten years later, a federal Court of Claims commissioner in *Williams and Wilkins v. U.S.* (1972) sharply ruled against any assertion that Xerox copying by the National Institutes of Health of scientific articles from medical journals could be considered "fair use," irrespective of the limited audience or the probability that the research had been financed by the government and the articles provided to the professional magazines without fee or royalty.

In both cases, there was a distinct disinclination to permit the use or copying of a complete entity as "fair use"–whether it be a song or poem, article or book–even for purely instructional or research purposes.

That is not to say that "fair use" has no place in educational materials. A quotation from a well-known book would appear eminently reasonable on a final examination; part of a movement from a classical symphony can be defended in a music appreciation course; a portion of a scene from a prominent play can probably be included in a televised drama appreciation series; and typical TV commercials could not seem precluded from a film-making training film. But there is little assurance in the present state of the copyright law that "fair use" justifies duplication and distribution of *full* copyrighted w[illegible]–no matter how educational the prupose or non-profit the producer.

The major "fair use" avenue open to educational broadcasters for full works probably lies in the historical "single-copy" practice that has grown up especially in the public and university libraries. Few copyright lawyers have denied the free right of any library patron to copy, by hand or typewriter, whole chapters, articles or even books for study, research or similar use. And if the presence of a coin-operated Xerox or other copying machine in almost every library has often been deplored by publishers, it has never been the subject of direct legal attack. It is conceivable that the same doctrine might be extended to a single slide of a photograph, a single tape of a record, or a single videotape of a television program, but probably only so long as other "fair use" criteria are observed–i.e. no substantial diminution of potential profits from the original work, no long-term use or wide distribution of the succeeding work, and, above all, no important confusion or competition between the two. This, however, is still pretty much uncharted in the courts and Congress.

COPYRIGHTED MATERIALS

With the rather general and somewhat simplified copyright concepts so far in mind, it is now probably most helpful to consider the availability of various types of educational and informational materials for educational broadcasting.

1. **Books and Periodicals** (i.e., non-dramatic literary works, including fiction and non-fiction, prose and poetry, volumes and articles, but excluding photographs and illustrations).

Books and periodicals are, of course, subject to prime application of the "for profit" and "fair use" exemptions historically implicit in copyright law. Because of publishing practices, however, printed material is surprisingly susceptible to copyright deficiencies. Copyright notices are not infrequently in the wrong form, contain incorrect names or dates, or are printed in the wrong place. Even if entirely correct, the vast majority (some 80% to 90%) of printed literature copyrights are not renewed; much of the 10% to 20% renewals do not conform to all of the substantive and procedural requirements (e.g. intervening death of the original author, assignment of copyright during initial term, wrong renewal applicant, failure to apply for renewal within 28th year, etc.). While for many reasons, both economic and practical, these failings only rarely lead to competitive reprints without the publisher's permission, they may well justify use for educational content without copyright clearance.

As a rule of thumb, any printed book or periodical from before 1906 is unquestionably in the public domain. Books or periodicals dated prior to 1934 should be researched for renewal–the U.S. Copyright Office in Washington, D.C. is happy to respond to renewal inquiries in person or by mail, often without charge but sometimes for a small file-search fee. When found to be in valid copyright and renewal, books and periodicals can still be read and recited over educational television or radio without payment or permission–especially if the program is not excessively duplicated and widely distributed. And, in any case, excerpts and quotations can always be used in the context of illustration or criticism, whatever the extent of exposure or mode of expression.

2. **Music and Records** (i.e., non-dramatic music, including classical symphonies, choral pieces, pop numbers, folk and rock songs, but excluding operas and cast albums).

By virtue of the "for-profit" exemption, music licenses are *not* required from ASCAP, BMI or SESAC–the three main American performing rights societies–for educational transmission. Nor is it clear from the Copyright Act that recording rights licenses are required for producing or duplicating audio or video tapes other perhaps than the "compulsory license fee" designed for phonograph records.

It is true that commercial practice has been to clear so-called "synchronization" rights for music synchronized to picture in theatrical films and television videotapes (to the extent not already covered by the ASCAP, BMI and SESAC television network licenses) with the music publishers or their principal agents. But there has been considerable question amongst copyright experts themselves as to whether this clearance is really required under the Copyright Act–or occasioned more by the fact that the leading film studios are also major music publishers. So the slate is fairly clean for educational broadcasters if they should elect (as many already have) to omit clearance of recording rights–whether denominated as "synchronization" or "mechanical" rights–unless the film or tape recording is to be broadly distributed on a commercial or fee-charging basis.

The above discussion, it should be noted, concerns *music* only. Very often, the music selected for broadcast is taken from a phonograph record–i.e. discs, tapes or cassettes–rather than performed and/or recorded "live" by a school or other musical group. It should be remembered that phonograph records may, since last year, be copyrighted with a Ⓟ symbol instead of the usual ©. Despite this new copyright status–aimed primarily at combatting mushrooming tape piracy activities all over the country–the legislative document accompanying the new amendment makes it clear that public broadcasters may incorporate phonograph records in television and radio programs without clearing the record companies, performers or their unions. And while no mention was made of educational or instructional programming, there is good reason to believe that the exclusion applies equally to limited-frequency television, closed-circuit systems and other in-school exhibition uses as well. That is not to say that overly flagrant use of popular records (e.g. an entire Rolling Stones favorite

number or complete original cast "West Side Story" performance) could not be subject to attack on "unfair competition" or "wrongful misappropriation" grounds still recognized by many state courts. Nor does it seem particularly equitable for educational broadcasters to make use of popular stars or recordings without requesting appropriate permissions. But nothing in the copyright law would appear to be preclusive–except, of course, the fear that the current favorable statutory interpretation may easily be changed by sustained misuse or over-use in educational programming.

3. **Motion Picture Films** (i.e. educational and documentary films, including 16mm and 8mm films distributed both commercially and non-commercially, but excluding feature and foreign films produced primarily for paid theatrical bookings and commercial television broadcast).

Motion pictures are separately categorized in the Copyright Act as "motion picture photoplays" and "motion pictures other than photoplays"–and in either case have been referred to by the Copyright Office as including videotape as well. "Motion picture photoplays" are generally considered to include the feature films of a fictional nature produced in Hollywood and abroad. "Motion pictures other than photoplays" include most, if not all, of the documentary and educational films of specific interest to schools and higher learning institutions.

In either case, however, it is difficult to assimilate motion picture films to the non-dramatic literary or music works subject to the "for profit" performance exemption. And tape or film duplication of a copyrighted motion picture undoubtedly violates the copying restrictions in copyright law, except to the limited extent permissible as "fair use."

Most educational film prints are sold for long-term retention or rented for short-term exposure. With very few exceptions, audiovisual film catalogues expressly prohibit television use–although there are differences in wording which may or may not exclude in-school closed-circuit tranmission. Once a film print has been sold to an educational institution, however, its use beyond the intent and/or consent of the film producer or distributor is not so much a matter of copyright infringement as of breach of contract. In the case of educational films, the purchaser's agreement not to broadcast is implicit rather than explicit, and derives from trade custom more than conscious concurrence. As a result, it is not beyond argument that unless the film purchaser agrees–orally or in writing, by acknowledging the invoice or signing the shipping receipt–not to permit the purchased print to be exhibited electronically or by interconnection beyond the immediate direct-projection audience, the catalogue restrictions may not be legally enforceable. Certainly, the fact that on the one hand current school practice is not to differentiate between communication modes, and on the other, certain instructional television distributors as a matter of practice permit showing of TV films and tapes over any in-school receiving facilities during the authorized use period, would militate against alleged contract enforcement by commercial distributors. And any concerted effort by film distributors to explicitly obtain as a sales condition the purchaser's signed promise not to transfer the film print to videotape or use a film-chain or otherwise show the print on television receivers beyond the immediate classroom or auditorium could as well be met by demands from school purchasers that all such uses be expressly included in the sale or lease documents, whether at the same or a higher price.

4. **Television Programs.** Television programs, whether educational or commercial, do not substantially differ in copyright considerations from motion picture films–especially where the TV program consists wholly or partially of a motion picture film. Both educational and commercial television programs are generally available for videotape and/or 16mm audiovisual availability on a purchase or rental basis. More often than films, however, rights and union restrictions limit long-term in-school re-broadcast over ETV or 2500 MHz transmitters, over community cable channels, and sometimes even over educational closed-circuit facilities. So in general, the exact use that may be made of a television program supplied by an authorized distributor is set forth in the license document signed by both the user and distributor.

Off-air television use is a somewhat more complicated question. The commercial networks have repeatedly declared that re-use of their television programs in any way violates their copyright and other legal rights and have strongly indicated their intention to prosecute violators, be they educational or

entertainment-oriented. But no such network suit has yet been begun in face of the rather open school practice of recording off-air for subsequent classroom viewing. Certainly, videotaping a night-time program for school showing the next day does not seem far from the simultaneous relays permitted cable systems under the *Fortnightly* and *TelePrompTer* decisions–although additional re-use might well, of course, fall foul of the *Disney v. Alaska TV* proscription.

Under the current state of the applicable law, therefore, a case can be made for temporary school off-air recording for closed-system exposure–and it is doubtful that commercial or educational television producers will prosecute so long as the off-air recording is kept to narrow proportions and does not include re-duplication or re-transmission beyond a single school or campus. But the question has not been positively answered as yet, especially in the light of the recent unfavorable *Williams and Wilkins* decision against government Xeroxing even on a so-called "single-copy" by-request basis.

5. **Film Strips.** Film strips are generally purchased by educational institutions without permission to duplicate in entirety or to copy individual frames. If there is no express prohibition in the order or invoice forms, however, there is no reason why film strips as a whole, or their component elements separately, cannot be shown on educational closed-circuit or open-broadcasting television.

On the other hand, videotape or other duplication for such showings, unless limited to the same school or system for which originally purchased, could be viewed as a copyright infringement, and would undoubtedly be strongly resisted by film strip producers and distributors. There would possibly not be so strong an opposition to reproduction or adaptation of individual frames solely for slide or other classroom projection purposes.

6. **Photographs.** Still photographs are widely available in many different ways–e.g. from books and magazines, from photograph services and photographer associations, from commercial companies and non-profit institutions, from public agencies and private sources, etc. If published with a copyright notice (either on the photograph itself or on the volume or issue in which printed), the photograph is probably protected by the copyright law and cannot be transferred or copied without permission from the copyright source. Conversely, if not published (that is, publicly sold or otherwise generally distributed), a photo remains within the exclusive control of its creator and again cannot be duplicated on film or tape without the photographer's consent.

A photograph published in print or otherwise widely distributed without a copyright notice in the vicinity can, however, be assumed to have entered the public domain and thus is freely available for educational use of any and every type. Moreover, the use of any slides or photos on "live" programs over closed-circuit or open-broadcast television appears justified by the absence of any technical "performance" restrictions in the copyright law. But, as in the case of other materials, videotape duplication of instructional programs containing non-cleared copyrighted pictures is still risky–especially if the videotape dubs are sold or licensed, and the photographs are from a picture-conscious source such as *Life Magazine* or *National Geographic*.

RECENT DEVELOPMENTS

During the summer and fall of 1972, copyright renewals for all works published since 1906 were once again extended through 1973 and 1974 in a last-ditch effort to permit the long-postponed copyright revision legislation to come to fruition without prejudice to intervening expiring copyrights. Previously in November 1971, Congress had enacted an amendment to the copyright law effective February 15, 1972 designed as federal assistance to state law attempts at curbing tape piracy of phonograph records.

In the course of the 1972 legislative renewal, the Chairman of the House Copyright Subcommittee voiced his concern about unwarranted extension of copyright monopolies to the detriment of public and educational utility. And the Congressional reports on the anti-tape piracy amendments specifically exempted educational and public broadcasting from recording or duplication prohibitions in connection with commercial phonograph records.

The overall copyright revision, currently before the Senate Subcommittee on Patents, Trademarks and Copyrights as S.644, similarly contains several provisions apparently designed to ease copyright restrictions for instructional television and audiovisual utilization. It has been pointed out that the new instructional television and audiovisual provisions still do not fully permit desirable school use, and that, in any case, non-classroom broadcasts and cablecasts stand to lose their present "for profit" dispensations without any statutory substitute except an even vaguer statutory adoption of "fair use" principles.

The present situation is admittedly indefinite and somewhat confusing. While the current law offers little express authorization for widespread educational practices, there is considerable room for administrative and judicial interpretation sympathetic to educational uses. If and when the latest legislative revision is enacted, statutory prohibitions may well become more explicit and interpretative discretion narrower. In the meantime, however, both educators and lawyers must try to fit current educational broadcasting practices into the 1909 statutory pattern to the best possible advantage.

BIBLIOGRAPHY

Law

U.S. Copyright Act, Title 17 of the U.S. Code, originally enacted March 4, 1909 and last amended effective February 15, 1972.

Textbooks

Benjamin Kaplan and Ralph J. Brown, Jr., *Copyright: Cases and Material*, Foundation Press, 1960. Supplemented in *Intellectual Property 1960-1971* by Albert P. Blaustein and Robert A. Gorman (1972).

Melville B. Nimmer, *Nimmer on Copyright*, Matthew Bender, 1963-1972. Volume I, Sections 107-109 and 145-149 are especially relevant to educational communications.

Treatises

Julius J. Marke, *Copyright and Intellectual Property*, Fund for the Advancement of Education, 1967.

Fred S. Siebert, *Copyrights, Clearances and the Rights of Teachers in the New Educational Media*, American Council on Education, 1963.

Articles

Eugene N. Aleinikoff, "Educational Television—A Non-Commercial Viewpoint," *Iowa Law Review*, February 1968 (Vol. 53, No. 4). Reprinted in the *Educational Broadcasting Review*, April 1969 (Vol. 3, No. 2).

Comment: "The Legal Problems of Educational Television," *Yale Law Journal*, February 1958 (Vol. 67, No. 4), p. 639+.

Note: "The Copyright Law Revision and ETV: An Alternative to the Wasteland?", *Rutgers Law Review*, Fall 1968 (Vol. 23, No. 1), p. 104+.

Cases

Associated Music Publishers, Inc. v. Debs Memorial Radio Fund, Inc., 141 F.2d 852 (2d Cir. 1944).

Wihtol v. Crow, 309 F.2d 777 (8th Cir. 1962).

Fortnighty Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968).

Walt Disney Productions v. Alaska Television Network, Inc., 310 F. Supp. 1073 (W.D. Wash., 1969).

Tape Industries Association of America v. Younger, 316 F. Supp. 340 (C.D. Cal. 1970).

Capitol Records v. Spies, 167 U.S. Patent Quarterly 489 (Ill. App. 1970).

Columbia Broadcasting System, Inc. v. Spies, 167 U.S. Patent Quarterly 492 (Ill. Cir. Ct. 1970).

Williams and Wilkins v. U.S., 172 U.S. Patent Quarterly 670 (U.S. Ct. of Claims 1972).

Columbia Broadcasting System, Inc. v. TelePrompTer Corp., 173 U.S. Patent Quarterly 778 (S.D.N.Y. 1972).

This paper is distributed pursuant to a contract with the Office of Education, U.S. Department of Health, Education, and Welfare. Contractors undertaking such projects under government sponsorship are encouraged to express freely their judgment in professional and technical matters. Points of view or opinions do not, therefore, necessarily represent official Office of Education position or policy.